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No. 00-832

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

In our petition, we demonstrated that review by this Court was necessary to resolve the issue – squarely addressed by the court of appeals as part of a consolidated, nationwide appeal – of whether cable systems that provide Internet services over the same lines that they use to provide video programming services thereby forfeit regulatory oversight designed to ensure "just and reasonable" "rates, terms, and conditions" for their access to essential bottleneck facilities owned or controlled by utilities. Pet. 3, 13-26. We showed that the court of appeals' ruling misconstrues congressional intent as expressed in the plain language of 47 U.S.C. § 224 ("Section 224"), Pet. 16-19, creates a conflict with a decision of the D.C. Circuit, Pet. 19-20, and undermines the purposes underlying Section 224 and the 1996 Telecommunications Act on an issue of surpassing national importance. Pet. 20-25. Respondents fail to undermine any of these conclusions.

Respondents' arguments for avoiding review by this Court are essentially two-fold. First, they contend that the court of appeals properly concluded that Congress intended to deny cable operators the regulatory protections established by Section 224 if they choose to commingle Internet service with their traditional video programming services. Opp. 8-13. Second, they insist that the decision below is not important because Section 224 is no longer necessary to ensure access to bottleneck facilities, Opp. 16-17, and, in any event, Section 224 has little practical effect because, in respondents' view, their ability to charge excessive rates for access to bottleneck facilities is constitutionally protected and therefore "will not be affected one way or another by a decision regarding Section 224 coverage." Opp. 7.

As demonstrated below, respondents are mistaken on both counts. The court of appeals' decision improperly rejected the FCC's reasonable construction of Section 224. Indeed, the central fallacy in the court of appeals' ruling was its

conclusion that Congress intended to repeal the regulatory authority that the FCC admittedly possessed over pole attachments "'regardless of the type of service provided over the equipment attached to the poles,'" *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993), by "expand[ing] the scope of the coverage of section 224." H.R. Conf. Rep. No. 104-458, at 206 (1996). That error is highlighted by respondents' efforts to reconcile the decision below with the D.C. Circuit's *Texas Utilities* decision. Moreover, respondents never explain why Congress would have stripped cable operators of regulatory protection for providing a service that Congress expressly sought to promote.

As to the importance of the case, respondents ignore that this is a consolidated, nationwide appeal arising out of Hobbs Act review involving "the competing interests of [power] companies, telephone companies, cable television companies, . . . Internet service providers, and . . . consumers" on an issue "that may affect every person who uses . . . Internet service in this country." Pet. App. 96a. Nor do they dispute that the issue presented here cannot be relitigated in any other court of appeals. Their claims that Section 224 is no longer necessary and, in any event, has no impact on the rates respondents will charge are easily refuted. The notion that Section 224 is no longer necessary is no more than a misguided dispute with Congress regarding its decision in 1996 to amend Section 224 to *expand* its regulatory scope. Moreover, respondents' claim that they are constitutionally entitled to recover so-called monopoly "market rates" for providing access to essential bottleneck facilities is contrary to settled law, and, if accepted, would render all rate regulation of monopoly enterprises unconstitutional.

In short, this case squarely presents an issue of national importance that was improperly decided by the court of appeals and should be resolved by this Court.

1. Respondents' primary argument for avoiding review by this Court is their contention that the court of appeals'

holding is correct. Opp. 8-10. Respondents do not dispute that Section 224(b)(1) provides a "general grant of power to the FCC to regulate the 'rates, terms, and conditions for pole attachments,'" Opp. 8 (quoting 47 U.S.C. § 224(b)(1)), or that, as a result of the 1996 amendments, the definition of "pole attachment" was broadened to include "any attachment by a cable television system or provider of telecommunications service." 47 U.S.C. § 224(a)(4). They argue, however, that the court of appeals properly "held that the FCC's general grant of power in Section 224(b)(1) to regulate pole attachments is *defined and limited* by the specific standards set out in subsections (d) and (e) for attachments used for cable service and telecommunications service." Opp. 9. Specifically, they contend that, apart from the rates set forth in subsections (d) and (e), "'*no other rates are authorized.*'" *Id.* (quoting Gov't Pet. App. 27a). Their argument is without merit.

a. Nothing in subsections (d) and (e) limits the FCC's general authority to regulate the "rates, terms, and conditions" of "any attachment used by a cable television system." Rather, subsections (d) and (e), by their terms, set forth the rate structures that the FCC should apply under two specific circumstances: where a cable television system provides "solely . . . cable service," 47 U.S.C. § 224(d)(3), and where a telecommunications carrier provides "telecommunications services," *id.* § 224(e)(1). As to all other circumstances, the FCC still must ensure that the rates, as well as the terms and conditions, are "just and reasonable." *Id.* § 224(b)(1).

Moreover, Congress was aware that there were "other" circumstances when it enacted the 1996 amendments to Section 224. Prior to those amendments, the FCC concluded that it was authorized to regulate the "rates, terms, and conditions" for pole attachments "'regardless of the type of service provided over the equipment attached to the poles,'" and that determination was affirmed on appeal. *Texas Utils.*, 997 F.2d at 927. Thus, respondents' position is that

Congress, by expanding Section 224 and setting forth the rates that would apply in two specific circumstances, repealed, by negative implication, the FCC's authority over the "rates, terms, and conditions" of "pole attachments" in all other circumstances. See Opp. 9. That conclusion is contrary to the "cardinal principle . . . that repeals by implication are not favored," *United States* v. *United Continental Tuna*, 425 U.S. 164, 168 (1976), and that a party advocating such a repeal "bears a heavy burden of persuasion," *Amell* v. *United States*, 384 U.S. 158, 165 (1966).

Respondents' argument that "'the specific governs the general'" comes nowhere close to meeting that "heavy burden." Opp. 9 (quoting *Morales* v. *TWA, Inc.*, 504 U.S. 374, 384 (1992)); see also *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). That principle of statutory construction applies only if there is a conflict between a general and a specific statutory provision so that the "specific statute" will not be "nullified by a general one." *Id.*; accord *Morales*, 504 U.S. at 385. Here, however, there is no conflict between the general grant of authority to regulate "rates, terms, and conditions" of "any" pole attachment under subsection (b)(1) and the "specific" requirements of subsections (d) and (e). To the contrary, when read together, the "specific" provisions define how the FCC should meet its "general" responsibility of ensuring "just and reasonable" rates in two specific cases but do not otherwise limit the FCC's "general" authority to regulate "any" pole attachment.

Respondents argue that Congress "can not reasonably be assumed to have provided highly detailed standards for cable and telecommunications attachments, yet to have provided *no* standards for attachments for *other* services." Opp. 9. That is wrong for two reasons. First, Congress has, in fact, provided a standard for "attachments for *other* services" by dictating that "rates, terms, and conditions" must be "just and

reasonable." 47 U.S.C. § 224(b)(1).[1] Second, it is entirely reasonable for Congress (i) to grandfather the pre-existing rate scheme by dictating that cable operators that provide "solely cable service" will continue to be governed by subsection (d); (ii) to ensure that "telecommunications carriers" that provide telecommunications services are all subject to the rate structure in subsection (e); and (iii) to allow the FCC to prescribe "just and reasonable" rates for "attachments" in all other circumstances.

The FCC's interpretation of Section 224 also furthers and is consistent with the core pro-competitive purposes underlying the 1996 Act. And even if Section 224 were ambiguous on the question whether the FCC's authority has been expanded, respondents offer no response to the settled law dictating that the FCC's reasonable interpretation must prevail. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999); *Chevron, U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-43 (1984).

b. Similarly, respondents also are mistaken in arguing that "the Eleventh Circuit's ruling does not conflict with the D.C. Circuit's decision in *Texas Utilities*." Opp. 10. Of course, as we previously noted, the court of appeals "argued that its decision could be reconciled with the D.C. Circuit's." Pet. 20. But respondents do nothing to undermine the conclusion that the court of appeals' efforts in this regard were unpersuasive and merely highlight its misreading of Section 224. Pet. 20-23. In fact, respondents make the same error as the court of appeals, Pet. App. 28a n.32, when they "sever" subsection (b) from the statute and argue that "the

[1] Respondents' claim that a "just and reasonable" standard calls "into question whether the statute violates the non-delegation doctrine," Opp. 9, is frivolous. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-01 (1944) (upholding "just and reasonable" standard for FPC ratemaking). Indeed, under respondents' view, the core of the Communications Act of 1934 is of doubtful constitutionality because it requires that "[a]ll charges, practices, classifications and regulations for . . . communication service, shall be *just and reasonable*." 47 U.S.C. § 201(b) (emphasis added).

amended [Section 224] presents 'an entirely different situation' from that faced by the D.C. Circuit" because "subsections (d) and (e)" specify "that 'solely cable services' and 'telecommunications services' are to receive regulated rents." Opp. 10-11. Section 224 says no such thing. It provides that pole attachments used for "solely cable services" will receive the regulatory treatment set forth in subsection (d); those used for "telecommunications services" will receive the regulatory treatment set forth in subsection (e); and, for all other pole attachments, the FCC must ensure "just and reasonable" rates under subsection (b).

Respondents never address the central flaw underlying the court of appeals' efforts to distinguish *Texas Utilities*. According to the court of appeals, it was "faced with an entirely different situation" because the amendments to Section 224 *limited* the scope of the FCC's authority under Section 224. But the amendments to Section 224 quite clearly *increase* the scope of the FCC's authority by expanding the definition of "pole attachment" to cover "provider[s] of telecommunications service." 47 U.S.C. § 224(a)(4); H.R. Conf. Rep. No. 104-458, at 206 (amendment "expands the scope of coverage of section 224").

c. Respondents erroneously contend that the court of appeals' decision – which penalizes cable operators if they provide Internet services over the same lines they use to provide traditional video programming services by withdrawing regulatory protections from both services – is consistent with Congress' policy of promoting deployment of high-speed Internet services. Opp. 11-13.

First, respondents mischaracterize 47 U.S.C. § 230(b)(2), which expresses a policy "to preserve the vibrant and competitive free market that presently exists for the Internet." *Id.* The FCC's construction of Section 224 does not regulate providers of Internet services. Instead, it ensures providers of Internet services access to essential inputs at "just and reasonable" rates. Congress understood the difference – in

similar fashion, it required that providers of high-speed access to the Internet be given access to monopoly telephone lines, and properly recognized that this requirement promotes, rather than interferes with, the "free market" for Internet services. See *id.* § 251(c)(3); Order On Remand, *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 15 FCC Rcd 385, 389 (¶ 9) (1999).

Second, respondents argue that interpreting Section 224 to exclude Internet service provided by cable operators "merely levels the competitive playing field for the delivery of Internet service" because "incumbent local exchange carriers," who are "the cable industry's largest competitors in the delivery of Internet service" are excluded from Section 224. Opp. 12. That argument is baseless. As respondents point out, Congress enacted Section 224 in response to complaints by cable operators "that some utilities (*principally telephone companies*) had exploited their 'monopoly' position over these 'bottleneck facilities' by charging excessive rates for pole attachments." Opp. 1 (emphasis added). Indeed, Section 224(a)(1) includes "local exchange carrier[s]" as part of its definition of the "utilities" that must provide access to their facilities. Accordingly, incumbent local exchange carriers ("ILECs") had no need for Section 224 because "poles, ducts, and conduits are usually owned by telephone and electric power utility companies, which often have entered into joint use or ownership agreements." S. Rep. No. 95-580, at 12 (1977). Thus, withdrawing the regulatory protections of Section 224 from cable operators offering Internet service does not "level" the playing field because ILECs obviously are not, and have not been, subject to "excessive rates" for access to poles, conduits and ducts that they already own or control.[2]

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[2] As for "facilities-based Internet service providers which are not cable companies or telecommunications carriers," respondents fail to identify any such entities. Opp. 12. Indeed, they acknowledge that "'[m]ost'" residential and small business consumers receive Internet from "'ISP's via

d. Respondents argue that review should be denied to avoid "a premature consideration of the proper regulatory classification of Internet service," Opp. 13, which "should be made in the first instance by the policy-making branches of government, on the basis of a full and complete record." Opp. 15. That argument is exactly backwards. It was the court of appeals that brushed aside the FCC's statement that it need not decide "the precise category into which Internet services fit," Pet. App. 66a (¶ 34), ignored that the FCC's analysis of this issue was ongoing, *id.* (¶ 33), and instead decided that Internet service provided over a cable system was neither a cable nor a telecommunications service. *Id.* at 26a-29a. In doing so, the court of appeals did not, as respondents argue, "merely appl[y] the FCC's existing pronouncements about the nature of Internet services as it found them." Opp. 14.

Rather, the court of appeals engaged in its own independent analysis and concluded that Internet service was not "a cable service," Pet. App. 26a-28a, and that "there is no statutory basis for the FCC to regulate the Internet as a telecommunications service." *Id.* at 29a. As the FCC pointed out, resolution of that issue was unnecessary because the "definition of 'pole attachment' does not turn on what type of service the attachment is used to provide." *Id.* at 63a (¶ 30). Accordingly, review by this Court would not result in a premature resolution of the proper regulatory classification of Internet service, but rather would vacate and render unnecessary the court of appeals' efforts to do precisely what respondents now contend is improper.[3]

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traditional "dial-up" telephone services provided by local exchange carriers.'" Opp. 12 n.5; *see also* Second Report, *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans*, CC Docket No. 98-146, ¶ 71 (FCC Aug. 21, 2000) (noting that cable operators and telephone companies providing DSL account for almost 95% of high-speed services to residential and small business subscribers).

[3] Even if this Court ultimately rejected the FCC's analysis and concluded that Section 224 applied only to cable and telecommunications services,

2. Even though the decision below was rendered in a nationwide, consolidated appeal regarding "industry-shaping issues of exceptional importance" that "may affect every person who uses . . . Internet service in this country," Pet. App. 96a, respondents insist that the denial of review will not harm the deployment of high-speed Internet service. Opp. 15. That argument is without merit.

a. Respondents are wrong in arguing that the decision below merely requires cable operators "to pay the same rates as their competitors." Opp. 15. As demonstrated above, *supra* 7, the ILECs, who respondents acknowledge are the cable industry's principal competitors for the provision of high-speed Internet service, are not subject to the same "excessive rates" as cable operators because they already own or control the facilities to which the cable operators require access. Indeed, the fact that cable operators must seek access to these essential bottleneck facilities from their largest competitors highlights the importance of ensuring that the "rates, terms, and conditions" of that access are "just and reasonable." 47 U.S.C. § 224(b)(1).

b. Respondents contend that they are constitutionally entitled to "charge a market rate for pole attachments" and therefore "there will be *no* practical consequences of a denial of the petitions, since cable companies will be charged a market rate for commingled cable/Internet attachments" "irrespective" of whether Section 224 applies. Opp. 16. That argument is frivolous. Even if the access requirement of Section 224 constituted a taking, Pet. App. 17a-19a, this Court has made clear that there is no "rigid rule for determining what is 'just compensation' under all circumstances and in all cases." *United States* v. *Commodities Corp.*, 339 U.S. 121, 123 (1950). Rather, "the

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the proper course would be to remand the case to the FCC so that it could decide, in the first instance, the correct regulatory classification for Internet access services provided by a cable operator.

dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" *Id.* Respondents have no support for the notion that "just compensation" is the "market rate" charged by a monopoly for access to essential bottleneck facilities. Indeed, under respondents' view, rate regulation of monopolies would be unconstitutional unless the regulated rates were equal to the monopoly "market price" that was the predicate for the rate regulation in the first place.[4]

c. Respondents finally argue that this case is not important because Section 224 is no longer relevant in that "utility poles and conduits . . . are almost never bottleneck facilities today." Opp. 16. But their assessment is nothing more than a misguided disagreement with Congress, which, in 1996, properly recognized the continuing need for such regulation when it amended Section 224 to "expand[] the scope of [its] coverage." H.R. Conf. Rep. 104-458, at 206. For example, respondents point to a 1962 Los Angeles regulation, Opp. 17 n.8, to argue that a federal statute enacted in 1978 and expanded in 1996 is no longer justified. Even if respondents were entitled to second-guess Congress, their argument that pole attachments are irrelevant because wireline facilities are being "buried underground" ignores that Section 224 also applies to underground rights-of-way "owned or controlled" by utilities. 47 U.S.C. § 224(a)(4).

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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[4] Respondents improperly point to current *regulated* rates, Opp. 16, to argue that their *unregulated* monopoly rates would be, in their view, relatively small. In doing so, respondents do not dispute that utilities have imposed a 500 per cent rate increase after the decision below. Pet. 14.

Respectfully submitted,

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